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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-629

PLACID OIL COMPANY, ET AL
(Texaco, Inc., Intervenor)

Petitioners,

versus

STATE OF LOUISIANA, ET AL,

Respondents.

No. 74-638

TEXACO INC.,

Petitioner,

versus

STATE OF LOUISIANA, ET AL,

Respondents.

OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The State of Louisiana and Gulf Oil Corporation, Respondents, oppose the petitions for writ of certiorari to the Supreme Court of the State of Louisiana filed in this Honorable Court by Placid Oil Company, et al, and Texaco Inc., respectively in the matters styled "Placid Oil Company, et al (Texaco, Inc., Intervenor), Petitioners v. State of Louisiana, et al, Respondents," Docket No. 74-629 and "Texaco Inc., Petitioner, v. State of Louisiana, et al, Respondents," Docket No. 74-638.

The petitions of Placid Oil Company, et al, and Texaco Inc., are both directed to the opinion of the Supreme Court of Louisiana on rehearing in the case styled "State of Louisiana, et al, v. Placid Oil Company, et al, Texaco Inc., Intervenor," decided on June 10, 1974 and reported at 300 So.2d 172. A copy of that opinion is attached hereto as Appendix I (infra p. 25). An order was entered by the Supreme Court of Louisiana on August 30, 1974 denying applications for rehearing by Placid Oil Company, et al, and Texaco Inc., Intervenor.

This opposition is directed to both petitions and unless otherwise indicated, the use of the word "Petitioners" will refer to both Placid Oil Company, et al, and Texaco Inc.

STATEMENT OF THE CASE

Grand Lake in St. Mary Parish, Louisiana, was a large navigable water bottom in 1812 when Louisiana was admitted into the Union and still is, being one of the five largest waterbodies in Louisiana. This waterbody has from earliest times been designated on official maps as a lake, also being known at various times as "Lake Cheti-

maches" or "Lake Sale" (Salt Lake). It was about 30 miles long by three to ten miles wide with a thalweg depth of only eight feet. The lake was subject to the ebb and flow of the tide, contained brackish water and was populated by salt water fish.

Grand Lake is about 20 times wider than the Atchafalaya River which enters it. The currents of the river reduce substantially in the lake and 75% of the sedimentation is deposited therein with only 25% being carried out.

Grand Lake is a wide, irregularly shaped body of water of great size, relatively shallow depth, with a current substantially slower than that of the inflowing river. In its main characteristics it is similar to Lake Pontchartrain and Lake Calcasieu.

The foregoing salient features of Grand Lake are enumerated as the findings of the Supreme Court of Louisiana in the opinion complained of herein (Appendix I, p. 34). In relatively recent years a portion of Grand Lake with no precise boundaries became known locally as "Six Mile Lake." Hence, the references to Grand Lake-Six Mile Lake. Attached hereto as Appendix II (infra, p. 41) is a reproduction of a segment of a map of the State of Louisiana prepared by William Darby entered according to Act of Congress the 8th day of April, 1816, appearing in the record as Exhibits P-6 and D-91. On this map Grand Lake is identified as Lake Chetimaches and its size, shape and drainage pattern in relation to other major inland waterbodies in South Louisiana, particularly Calcasu Lake and Lake Mermentau is clearly shown. Calcasu Lake (now spelled "Calcasieu") was the subject

of litigation in the cases of *State v. Erwin*, 173 La. 507, 138 So. 84 (1931) and *Doiron v. O'Bryan*, 218 La. 1069, 51 So.2d 628 (1951) and Lake Mermentau is the waterbody later designated as Grand Lake (in Cameron Parish) which was the subject of litigation in the case of *Miami Corporation v. State*, 186 La. 784, 173 So. 315 (1937). The precise size and conformation of Grand Lake-Six Mile Lake herein involved (St. Mary Parish) as determined by official government surveys made in the early 1800's are shown on a reproduction of a segment Exhibit P-10A attached as Appendix IV of the petition for a writ of certiorari filed herein by Texaco, Inc. (p. 16a thereof).

Determining the salient characteristics in 1812 of Grand Lake-Six Mile Lake is vital because under the law of Louisiana that is the critical date for the determination of its legal classification as a lake or as a river or other stream for the purpose of the application of the State law relating to the rights of riparian owners in the bed thereof below the high water line.

Respondents, State of Louisiana and its mineral lessee, Gulf Oil Corporation, filed an action in trespass against Petitioners, Placid Oil Company, et al, to try title to a portion of the bed of Grand Lake-Six Mile Lake. The basis of Respondents' suit was that upon its admission into the Union in 1812 the State of Louisiana acquired title to the bed of Grand Lake-Six Mile Lake to its high water mark, that it had never been divested of title thereto and that without right or title Placid Oil Company, as mineral lessee of the other defendants, had entered thereon and drilled three oil wells. As a result of the pleadings the area in dispute was defined as that portion of the bed of Grand Lake-Six Mile Lake adjoining Sections 49, 50 and 68,

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Township 15 South, Range 11 East, St. Mary Parish, Louisiana, between the high water mark of Grand Lake-Six Mile Lake as it existed in 1812 and its present low water mark (hereinafter the "Area in Dispute").

Texaco, Inc., intervened as a defendant. The defense to Respondents' action in the State Court was that Grand Lake-Six Mile Lake was a river or other stream within the meaning of the pertinent statutory provisions hereinafter set out the banks of which, and the alluvion (accretion) attached thereto, are owned by the riparian owners, that the Area in Dispute, being below the 1812 high water mark and now above low water mark, constituted either the bank or alluvion attached to the bank of that waterbody, and that Petitioners, as the riparian owners, therefore owned the Area in Dispute.

At this point the litigation was purely and simply a local land title problem to be resolved in accordance with the findings of fact essentially under the following statutory and jurisprudential law of the State of Louisiana.

(a) Upon its admission into the Union in 1812 Louisiana acquired title to the beds of all navigable waterbodies to their ordinary high water mark and remained the owner thereof except to the extent it divested itself of title or otherwise recognized the title of riparian owners. *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *State v. Bozeman*, 156 La. 635, 101 So. 4 (1924).

The holdings in those cases were confirmatory of the prior holdings of this Court on the same point. *Shively v.*

Bowlby, 152 U.S. 1, 14 S.Ct. 548 (1894); *Hardin v. Jordan*, 140 U.S. 371, 11 S.Ct. 808 (1891); *Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301 (1917).

(b) Louisiana recognizes the title of riparian owners to a portion of the bed of a navigable waterbody between the ordinary high water mark and the ordinary low water mark in only the following instances:

(i) The riparian owner is recognized as the owner of the bank of a river or stream being, in this case, that area between the ordinary high water mark and the ordinary low water mark. L.S.A. Civil Code Articles 455 and 457; *State v. Richardson*, supra.

(ii) The owner of the bank of a river or other stream is recognized as the owner of the accretions formed successively and imperceptibly thereon, such accretions being called "alluvion." L.S.A. Civil Code Article 509; *State v. Richardson*, supra; *Seibert v. Conservation Commission of Louisiana*, 181 La. 237. 159 So. 375 (1935); *Amerada Petroleum Corporation v. State Mineral Board*, 203 La. 473, 14 So.2d 61 (1943).

Therefore, the basic issues in the case were:

(a) Was Grand Lake-Six Mile Lake "a river or other stream" within the meaning of L.S.A. Civil Code Articles 455 and 509?

(b) If the answer to (a) is affirmative, was the Area in Dispute either the bank of Grand Lake-Six Mile Lake under the provisions of L.S.A. Civil Code Articles 455 and 457, or formed as alluvion thereon within the meaning of L.S.A. Civil Code Article 509?

(c) If the answer to (b) is affirmative, where was the low water mark in Grand Lake-Six Mile Lake that delineated the extent of the Area in Dispute?

This action was filed in July, 1963 and the trial thereof in the District Court was completed in July, 1967. The Opinion of the District Court rendered in 1970 held that Grand Lake-Six Mile Lake was a stream within the meaning of L.S.A. Civil Code Articles 455 and 509, that the Area in Dispute was in part the bank of the stream and in part alluvion formed thereon under the provisions of those Articles, and precisely defined the *present* low water mark of the Area in Dispute on the basis of the extensive evidence placed in the record by the Defendants and Intervenor (Petitioners herein) as to the elevations throughout the entire Area in Dispute as established by their Civil Engineers, the records of the water levels of Grand Lake-Six Mile Lake recorded by the United States Corps of Engineers on a daily basis for a 31-year period commencing in 1932 and terminating in 1963, the year in which this litigation was filed, and other evidence. In December, 1972, the Court of Appeal First Circuit affirmed the decision of the District Court. The Supreme Court of Louisiana granted a writ of review and, after hearing, rendered its opinion on December 3, 1973, affirming the opinion of the Court of Appeal. Respondents herein filed an application for a rehearing which was

granted on January 11, 1974. In the meantime, on December 17, 1973, the decision was rendered by this Honorable Court in the case of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), and on January 15, 1974 all counsel were advised that one of the members of the Supreme Court of Louisiana requested that the *Bonelli* case be briefed as to its effect on the instant case.

Consequently the briefs of all parties and the arguments submitted to the Supreme Court of Louisiana on rehearing in May, 1973 dealt fully with the *Bonelli* case as well as the other issues previously argued. The position of Respondents herein was that the *Bonelli* case dealt solely with the title as between the sovereign and the riparian owner at the ordinary *high water mark* and that the title to the Area in Dispute was therefore not in any way affected by the *Bonelli* case inasmuch as the entire Area in Dispute was presently below the ordinary high water mark of Grand Lake-Six Mile Lake.

The Supreme Court of Louisiana issued its opinion on rehearing on June 10, 1974 reversing its original decision. That Court held that Grand Lake-Six Mile Lake was not a river or other stream within the meaning of L.S.A. Civil Code Articles 455 and 509, and found that the entire Area in Dispute was below the *present* ordinary high water mark so that the *Bonelli* case did not apply thereto (Appendix I, p. 37). The application of Defendants and Intervenor (Petitioners herein) for a second rehearing and the opposition thereto again discussed the *Bonelli* case and the question of whether the Area in Dispute was below the high water mark. That application was denied and Defendants and Intervenor have filed in this Court their petitions for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The two reasons advanced by Petitioners herein for the granting of a writ of certiorari are:

(1) That the opinion on rehearing in this matter by the Supreme Court of Louisiana did not follow the prior decisions of that Court thereby effecting an unconstitutional change in a rule of property relating to the manner of classifying waterbodies for the purpose of determining the applicability of L.S.A. Civil Code Articles 455 and 509; and

(2) That such decision did not properly apply to this case the holding in the *Bonelli* case, particularly in that it defined the high water line marking the limits of the State's ownership of the Area in Dispute so as to coincide precisely with the high water line as it existed when Louisiana was admitted into the Union in 1812.

Neither reason has a sound basis in law or fact as will be demonstrated. We will treat the second issue first in order to dispel any notion that a federal question exists which has been decided in a manner contrary to the rulings of this Court.

THE BONELLI CASE:

The *Bonelli* case involved the question of ownership of land in Arizona *above the high water mark* of the Colorado River, which land had been patented to private owners by the Federal Government prior to the statehood of Arizona. At the time the patent issued the land covered

thereby abutted the Colorado River, the waters of which, subsequently and over a period of years prior to 1938, submerged a substantial portion of the land patented. Construction of the Hoover Dam, begun in 1938, reduced the flow of water in the Colorado River so that its high water mark receded somewhat as a result thereof, and in 1959 a Federal Bureau of Reclamation Project deepened and rechanneled the Colorado River thereby further confining the waters of the river and substantially increasing the portion of the property described in plaintiffs' title which emerged above the high water level. The land subject to the litigation was that portion of the patented land described in plaintiffs' title which had been submerged by the waters of the Colorado River after the patent issued and was now re-emerged *above high water* as a result of the Hoover Dam and of the deepening and channeling of the river.

This Court stated that the issue before it in *Bonelli* was not what rights the State had accorded riparian owners in lands which the State holds as sovereign, but rather, how far the State's sovereign right extends under the equal-footing doctrine, that is, whether the State retains title to the lands formerly but no longer beneath the high water mark of the Colorado River or whether that title is defeasible by the withdrawal of those waters. The Court held that the issue was one to be determined by the Federal law, that under Federal law the title of the State to such formerly submerged lands was defeasible above the high water mark by the withdrawal of the waters, and that the surfacing of the land in litigation should be treated under Federal law as an accretion which was owned by the riparian owner to the high water mark of the Colorado River.

It is settled beyond question that upon admission to the Union, subject only to prior alienations thereof by the United States, the title to the beds of all navigable water bodies within their boundaries was acquired by the respective states to the high water mark and that thereafter the laws of each State govern the title to the beds of such water bodies which belong to the State up to the high water mark. *Shively v. Bowlby*, supra; *Hardin v. Jordan*, supra; *Arkansas v. Tennessee*, supra.

Those basic principles of the law are fully recognized and confirmed in *Bonelli*, which also pointed out that the Federal common law grants to the riparian owner on all navigable water bodies, including lakes and the sea, title to the accretions that build on their shores above the high water mark.

This case is concerned with the ownership of a large area of the bed of Grand Lake never patented nor transferred to private title. That area was found by the Supreme Court of Louisiana to be at present above ordinary low water and below ordinary high water. There is, therefore, nothing in this case in the nature of a federal question or in any manner at variance with the holding in *Bonelli*. It should have been and was properly decided in accordance with the laws of Louisiana relating to lands which lie below the ordinary high water mark of a navigable waterbody.

As pointed out hereinbefore, the effect of the *Bonelli* case on the instant case and the factual question of whether the Area in Dispute was below the present high water mark of Grand Lake, as that mark might be deter-

mined by use of one of the various methods of computations adopted in decisions of this Court, were briefed and argued in the Supreme Court of Louisiana in the first rehearing and were briefed again in the application for petitioners for a second rehearing. That Court's holding (Appendix I, pp. 37-38) was as follows:

> "As we view it, the *Bonelli* decision is inapplicable to the present case. The area in dispute there, once privately owned, was no longer part of the river bed. The Court found it to have a location above the *present* high-water mark.[1] The instant case involves a bank area and alluvion below the *present* ordinary high-water mark of the lake. Unlike the land in *Bonelli*, the title to the disputed area here is vested in the State 'as a matter of settled federal law.' See Arkansas v. Tennessee, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 (1917); Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); Hardin v. Jordan, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428 (1891).
>
> 'It follows that in the present case state law law governs the rights of riparian owners. Bonelli Cattle Co. v. Arizona, supra; Arkansas v. Tennessee, supra; Shively v. Bowlby, supra.
>
> 'In Bonelli Cattle Co. v. Arizona, supra, the United States Supreme Court reaffirmed the state-law principle, stating:
>
> > 'We continue to adhere to the principle that it is left to the States to determine the rights

> of riparian owners in the beds of navigable streams which, under federal law, belong to the State.' (38 L.Ed.2d at 535)"
> (Emphasis supplied)

In an attempt to make it appear that the opinion complained of is not in conformity with *Bonelli*, Petitioners' assert that such opinion did not make a finding as to the location of the "present" high water line of Grand Lake-Six Mile Lake but that it did define the high water line of Grand Lake-Six Mile Lake so as to coincide exactly with the ordinary high water line of that water body as it existed in 1812 when Louisiana was admitted into the Union. A more erroneous assertion could not be made.

The immediately foregoing quoted portion of the opinion complained of constitutes a direct and explicit holding by the Supreme Court of Louisiana that this case involves a bank area and alluvion below the "present" ordinary high water mark of the lake. That constitutes a finding of fact by the Court which had before it as part of the record voluminous evidence pertaining to the Area in Dispute. Such evidence was in the form of surveys with respect to land lines and elevations made shortly after the suit was filed but before the trial by Civil Engineers employed by Petitioners as experts, official records of the United States Corps of Engineers as to daily water levels in Grand Lake-Six Mile Lake maintained for a 31-year period up to 1963, as well as other documents and oral testimony. These pertained not to 1812 but to the period preceding, up to and including, and, in the case of some of the evidence, subsequent to the date of the filing of the suit. It is difficult for any court to render a decision more "present" than that.

Petitioners request that this matter be remanded to the Trial Court to determine whether alleged (but unproven) actions which may have been taken by the United States Corps of Engineers subsequent to the filing and trial of the case may have affected the Area in Dispute so that the high water mark as it exists today might be different. That request is completely unwarranted. To state the obvious, today is tomorrow's yesterday. Therefore, if there are conditions continuing to affect the high water level and low water level of Grand Lake-Six Mile Lake, Petitioners' "today" or "present" would never come.

In the Tidelands litigation the Special Master in the case, the Honorable Walter P. Armstrong, Jr., held that additional evidence (following the close of the hearing) should not be considered or permitted to delay the decision because of alleged subsequent shoreline changes:

> "The present hearings must be terminated at some specific point in time and the findings made based upon the evidence available as of that time." *Report of the Special Master,* the Hon. Walter P. Armstrong, Jr., to the United States Supreme Court in *United States v. State of Louisiana,* No. 9 Original filed July 31, 1974.

Although the Supreme Court of Louisiana found that the Area in Dispute was below the present ordinary high water mark of Grand Lake-Six Mile Lake, it did not define the high water line of the lake in the Area in Dispute, as is stated by Petitioners, and, therefore, could not have found

such a line to coincide exactly with the high water line of the lake as it existed in 1812, as was also stated.

The title asserted by the State of Louisiana in this action was to the Area in Dispute which extended from the high water mark of Grand Lake-Six Mile Lake as it existed in 1812 into the bed of the lake. The title to only that area was at issue before the Court and the evidence presented related to only that area. The Court was concerned with the location of the high water mark of Grand Lake-Six Mile Lake solely for the purpose of establishing whether the Area in Dispute was above or below that high water mark in order to determine the effect thereon of the *Bonelli* case. On the basis of the evidence before it the Court found as a fact that the Area in Dispute was below the high water mark but it did not, nor was it incumbent on it to so do, define the location of that high water mark. And, contrary to Petitioners' statements, the Court made no finding that such high water mark coincided exactly with that which existed in 1812.

This case was filed, duly tried, and now, in its twelfth year, is being considered in its third appellate court. Its course has run.

NO CONSTITUTIONAL ISSUE INVOLVED:

An alleged constitutional issue has been raised by Petitioners to the effect that the opinion complained of retroactively changed an established rule of property thereby depriving the Petitioners of their property without compensation in violation of the Due Process

Clause of the Fourteenth Amendment to the Constitution of the United States. Allegedly the Supreme Court of Louisiana changed a rule of property by not following the prior jurisprudence.

The fact that the decision complained of followed the established jurisprudence of Louisiana in classifying Grand Lake-Six Mile Lake as a lake and not as a river or other stream can hardly be better demonstrated than it has been by the analysis of that jurisprudence in that opinion. In not one case ever decided by the Supreme Court of Louisiana involving the classification of a water body remotely similar to Grand Lake-Six Mile Lake has the result been different from this case. *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882); *State v. Erwin*, 173 La. 507, 138 So. 84 (1931); *Miami Corporation v. State*, 186 La. 784, 173 So. 315 (1937); and *Doiron v. O'Bryan*, 218 La. 1069, 51 So.2d 628 (1951).

In addition, there have been numerous cases decided by the Supreme Court of Louisiana involving large bodies of water, some traversed by rivers or other waterways and all smaller than Grand Lake-Six Mile Lake, in which the decision of the Court was based on the assumption that the water body involved was a lake and not a river or other stream.[1] On the other hand, no case has ever been decided by the Supreme Court of Louisiana involving a waterbody remotely similar to Grand Lake-Six Mile Lake in which the opinion has held or been based on the assumption that the waterbody was a river or other

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1 *Sapp v. Frazier*, 51 La. Ann. 1718, 26 So. 378 (1899); *Slattery v. Arkansas Natural Gas Co.*, 138 La. 793, 70 So. 806 (1916); *State v. Bozeman*, 156 La. 635, 101 So. 4 (1924); *Gulf Refining Company v. Grace*, 165 La. 979, 116 So. 405 (1928).

stream within the meaning of L.S.A. Civil Code Articles 455 and 509. Therefore, holding Grand Lake-Six Mile Lake to be a lake and not a river or other stream represents no change in the State law involved.

The cases of *Amerada Petroleum Corporation v. State Mineral Board*, 203 La. 473, 14 So.2d 61 (1943) and *Esso Standard Oil Co. v. Jones*, 233 La. 915, 98 So.2d 236 (1957) on which Petitioners rely each involved a completely different type of water body than Grand Lake-Six Mile Lake. After a discussion of these cases, the opinion complained of very succinctly puts them in proper context as follows:

> "We conclude, contrary to our first impression, that the holding of State v. Erwin as to the classification of lakes has not been overruled.
>
> 'It is true that sectors of the Court's language in several of the above cases focus strongly upon the existence of accretion-forming current in the water body. When these decisions are read as a whole, however, it is evident that the Court considered, not one, but several characteristics of the water body in making its classification. Our synthesis of these cases yields a conclusion that the existence of accretion-forming current is not, by itself, decisive of a stream classification. As noted in the dissenting opinion on original hearing, a holding that accretion-forming current alone is determinative that the water body is a stream would mean that all alluvion on all water

bodies accrues to the riparian owners, contrary to the intent of Article 509, the formal expression of legislative will." (Appendix I, pp. 32-33)

The last sentence quoted above is of itself complete answer to the erroneous contention of Petitioners that under the law of Louisiana the proper interpretation of L.S.A. Civil Code Articles 455 and 509 is embodied solely within the proposition that the existence of a water current of sufficient force and capacity to carry sediment and to form accretions is the determining test as to whether or not a water body is a stream.

It has been correctly stated in the opinion complained of that the jurisprudence of Louisiana has established a multiple-factor test for classifying a water body as a lake or as a river or stream. Petitioners question the validity and use of a multiple-factor test as something being added to our jurisprudence and as not being pertinent, preferring to rely solely on the discredited current-accretion test. As a matter of fact, at least four of such multiple-factors enumerated in the majority opinion were used directly in *Amerada* to sustain the conclusion reached by that Court. Specifically, it was found in *Amerada* that the Arm of Grand Lake (the waterbody involved therein) had banks (14 So.2d at 70), which Grand Lake-Six Mile Lake does not; that it was not subject to the ebb and flow of the tide (14 So.2d at 70), but Grand Lake-Six Mile Lake is; that the map makers, engineers and surveyors were consistent in the name given that water body, none calling it a lake (14 So.2d at 70), the designation that has without a single exception always been given to Grand Lake-Six Mile Lake; and that its "width is relatively insignificant as compared to the width of

Grand Lake and this width between banks negatives the idea that it is a lake instead of a widening branch or fork of the Atchafalaya River" (14 So.2d at 71). Applying this last factor to Grand Lake-Six Mile Lake it would be stated in the affirmative and would read in effect, "the width of Grand Lake relative to the insignificant width of the Arm of Grand Lake affirms the idea that Grand Lake is a lake instead of a widening branch or fork of the Atchafalaya River."

The decision in *State v. Cockrell*, 162 So.2d 361 (La. App. 1st Cir. 1964) rendered by the First Circuit Court of Appeal of the State of Louisiana found Grand Lake-Six Mile Lake to be a stream for the purpose of applying the laws of Louisiana relating to ownership of the beds of streams between the high and low water marks. The Supreme Court of Louisiana denied writs in that case. In the present case the First Circuit Court of Appeal followed the opinion rendered by it in *Cockrell* and again held Grand Lake-Six Mile Lake to be a stream.[2] However, the Supreme Court of Louisiana granted a writ of review in this case and reversed the Court of Appeal.

Petitioners now seek to make it appear that the action of the Supreme Court of Louisiana in denying writs in *Cockrell* had the effect of making the decision of the Court

2 Judge Landry, the organ of the Court of Appeal in *Cockrell*, and the Chief Judge of the Court of Appeal at the time of the argument of this case before that Court, wrote a vigorous dissent to the majority opinion rendered by the Court of Appeal in this case. In his dissenting opinion Judge Landry stated forthrightly that he was convinced that his original decision was in error, and that the Court of Appeal should overrule its prior decision, which position he then documented with a very lucid review of the jurisprudence of the Supreme Court of Louisiana on the subject.

of Appeal the decision of the Supreme Court in that case. From that false premise the inference is drawn that the Supreme Court of Louisiana in the decision complained of herein has changed its position. The law of Louisiana is directly contrary to that which Petitioners assert, as is stated so plainly by the Supreme Court of Louisiana in *Garlington v. Kingsley*, 289 So.2d 88 (La. 1974) in which it said at page 92:

> "The refusal of writs by this Court, which is usually based upon incomplete records and ex parte applications and without hearing, is not decisional law. This Court's action upon writs may be indicative of a predisposition on a certain legal issue but is not necessarily determinative of that issue. This Court is not bound by its refusal of writs to adopt law expressed in appellate court opinions, although it may well adopt such a case holding as law when, upon a full hearing, it is found that the holding is supported by positive law or, in the absence of positive law, by reason and logic or natural law."

See also *Colonial Pipeline Company v. Agerton*, 289 So.2d 93 (La. 1974).

There is no difference between the above stated position of the Supreme Court of Louisiana and that adopted on numerous occasions by this Honorable Court. *Hughes Tool Company v. Trans World Air Lines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973); *United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973); *Farr v. Pitchess*, 409 U.S. 1243, 93 S.Ct. 593, 34 L.Ed.2d 655 (1973).

In order to aid this Court in its visual conception of the waterbody involved herein, attached hereto as Appendix II (infra, p. 41) is a reproduction of a portion of a map of the State of Louisiana made by William Darby in connection with his exploration of the State of Louisiana in the early 1800's, which map was published in 1817 and appears in the record as Exhibit P-6 and also as Exhibit D-91. That map makes it obvious that the general characteristics of Calcasieu Lake (shown thereon as Calcasu Lake) and Grand Lake in Cameron Parish (shown thereon as Lake Mermentau) and Grand Lake-Six Mile Lake (shown thereon as Lake Chetimaches) were virtually identical at that time. The principal difference, which is readily apparent, is that Calcasieu Lake and Grand Lake in Cameron Parish are traversed from North to South by a river as well as other streams, whereas Grand Lake-Six Mile Lake was not at that time traversed by the Atchafalaya River, the main channel of which in fact runs to the North and East of the lake but the waters of which can reach the lake through various tributary streams. Unfortunately, the portion of the Darby map in the record does not show Lake Pontchartrain, the largest inland waterbody in Louisiana, but the decision complained of specifically held that in its main characteristics Grand Lake-Six Mile Lake is similar to Lake Pontchartrain. (Appendix I, p. 34).

Attached as Appendix I to the petition of Texaco Inc., is a reproduction of a segment of the official map of the State of Louisiana dated 1965 which appears in the record as Exhibit P-13. This map is presented as reflecting the manner in which Grand Lake-Six Mile Lake is an integral part of a dynamic system of flowing water involving the Atchafalaya, Mississippi and Red Rivers. Further, the

map is represented as demonstrating that the configuration and drainage pattern of Grand Lake-Six Mile Lake is not to be compared with the other lakes in the southern part of Louisiana, namely Grand Lake in Cameron Parish, Calcasieu Lake, White Lake and Lake Pontchartrain.

The petition of Placid Oil Company, et al, (page 8 thereof) also refers to the official map of Louisiana as showing Grand Lake-Six Mile Lake to be an integral part of the Atchafalaya River, "a dynamic sinuous stream of flowing water."

Respondents consider these portions of the petitions potentially misleading. We are concerned here with the application of the law of the State of Louisiana in determining the classification of a waterbody as a lake or as a river or other stream for the purpose of determining the title, according to the laws of Louisiana, of that portion of the bed of the waterbody located between the high and low water marks. For the purposes of such classification the law of Louisiana is clear that the character of the waterbody in 1812 is controlling. Therefore, the use of a map made in 1965 is misleading if it is intended in any way to reflect the character of Grand Lake-Six Mile Lake on the crucial date, 1812. For about the past fifty years the United States Corps of Engineers has been engaged in a massive public works program for flood control purposes which is changing the entire basin in which Grand Lake-Six Mile Lake is located and creating the channel for the Atchafalaya River through that lake. The result of that program is what Petitioners' 1965 map reflects.

CONCLUSION

This case involves no federal question inasmuch as the entire area in dispute lies between the ordinary low water mark and ordinary high water mark of a navigable waterbody in the State of Louisiana and is, therefore, subject to the laws of the State of Louisiana. The rule of law announced in *Bonelli Cattle Company v. Arizona*, supra, is not applicable to riparian lands below the ordinary high water mark and is, therefore, not applicable to this case.

The decision in the instant case of the Supreme Court of Louisiana in classifying Grand Lake-Six Mile Lake as a lake for the purpose of applying the State laws of ownership to the bed thereof is consistent with every other decision of that Court relating to waterbodies of similar size and characteristics. Consequently, such decision does not constitute a change in the law of Louisiana, retroactive or otherwise, and raises no constitutional issue relating to deprivation of property without compensation.

For the foregoing reasons the writ of certiorari petitioned for by Placid Oil Company, et al, and Texaco Inc., Intervenor, should be denied.

Respectfully submitted,

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